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Honorable Rosanna M. Peterson

7 **UNITED STATES DISTRICT COURT**
8 **EASTERN DISTRICT OF WASHINGTON**

9 R.W., individually and on behalf
10 of his marital community,

11 Plaintiff,

12 v.

13 COLUMBIA BASIN COLLEGE,
14 a public institution of higher
15 education, RALPH REAGAN, in
16 his official and individual
17 capacities, LEE THORNTON, in
18 his official and individual
19 capacities,

20 Defendants.

NO. 4:18-05089-RMP

DEFENDANTS' RESPONSE
TO PLAINTIFF'S MOTION
FOR SUMMARY
JUDGMENT

21 **I. INTRODUCTION**

22 The Court should deny R.W.'s motion for summary judgment because he (1)
fails to establish undisputed material facts and (2) fails to establish that he is entitled
to judgment as a matter of law on any of his claims. In fact, as discussed below, the

1 material facts that are beyond dispute, coupled with existing legal precedent,
2 actually require summary judgment in favor of the Defendants. *See generally* ECF
3 No. 31.

4 **II. ARGUMENT**

5 A party is entitled to summary judgment when the “pleadings, depositions,
6 answers to interrogatories and admissions on file, together with the affidavits, if
7 any, show that there is no genuine material issue of fact and that the moving party
8 is entitled to summary judgment as a matter of law.” Fed. R. Civ. P. 56(c). Here
9 the record, when taken as a whole, disproves R.W.’s factual contentions. This
10 alone makes summary judgment in favor of R.W. improper. Moreover,
11 applicable legal precedents illustrates that R.W. is not entitled to a judgment as a
12 matter of law on any of his legal theories, even if his factual contentions were
13 accurate.

14 **A. The Complete Record Blatantly Contradicts R.W.’s Version Of The** 15 **Facts.**

16 “When opposing parties tell two different stories, one of which is blatantly
17 contradicted by the record, so that no reasonable jury could believe it, a court
18 should not adopt that version of the facts for purposes of ruling on a motion for
19 summary judgment.” *Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769 (2007).
20 Such is the situation here. The College and R.W. tell different stories – but
21 because the complete record blatantly contradicts R.W.’s story, the Court should
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1 refuse to adopt his version. A few examples are particularly instructive.¹

2 First, R.W.'s motion grossly understates the significance of R.W.'s
3 disclosure that he thought of killing three of his instructors by setting fire to their
4 offices or attacking them with a saw. *See* ECF No. 36 at 6:1-7:14. For example,
5 R.W. describes his doctor's decision to contact crisis response as being "out of
6 an abundance of caution," ECF No. 36 at 7:6-7, and his residential treatment as
7 "voluntary." ECF No. 36 at 7:10-14. Nowhere in the cited material does Dr.
8 Cabasug minimize his decision as arising from an "abundance of caution." *See*
9 ECF No. 37-24 at 5. In contrast, Dr. Cabasug testified that his decision to call in
10 crisis response was appropriate. ECF No. 35-6 at 9. Nor was R.W.'s residential
11 treatment truly voluntary. Araceli Perez, the evaluating crisis responder, gave
12 R.W. the option of being civilly committed or voluntarily checking himself into
13 Transitions. ECF No. 35-1 at 36-37; ECF No. 35-2 at 49-51. These decisions by
14 Cabasug and Perez followed disclosures of homicidal ideation that R.W. himself
15 found disturbing and scary. ECF No. 35-2 at 43-44.

16 Second, R.W.'s motion misrepresents his academic progress in the 2017
17 Winter Quarter by casting unnecessary aspersions that faculty falsified

18 _____
19 ¹ The Defendants' Statement of Disputed Material Facts provides a more
20 complete list of examples where the complete record fails to support R.W.'s
21 allegations and those examples are incorporated herein by reference as if fully set
22 forth.

1 documentation of his academic struggles. ECF No. 36 at 8:17-9:4. R.W. testified
2 about academic struggles he was experiencing as early as February of the 2017
3 Winter Quarter. ECF No. 35-2 at 25-29 (R.W. Dep at 58:10-62:21). Valerie
4 Tucker, a CBC faculty member, testified about the continuing academic struggles
5 R.W. experienced during the 2017 Winter Quarter. ECF No. 35-3 at 20-25
6 (Cooke Dep. at 58:24-59:23, 60:23-61:11, 62:6-64:2). Just a few days before his
7 March 6, 2017 in-patient admission, R.W. exchanged emails with Tucker to set
8 a meeting to discuss his academic struggles (the second such meeting that
9 quarter). ECF No. 35-7 at 1-2. Moreover, during his March 6, 2017 interview
10 with crisis response, R.W. specifically identified his bad grades and feedback
11 from faculty as the trigger of his homicidal thoughts. ECF No. 35-1 at 19, 53
12 (Perez Dep. at 27:2-12, Ex. 2). R.W.'s accusation that faculty falsified reports of
13 his academic struggles is completely unwarranted.

14 Third, R.W. misrepresents specific events related to the Defendants'
15 knowledge of his health care conditions. For example, R.W. claims that Reagan
16 knew R.W. received accommodations *before* issuing the interim trespass. *See*
17 ECF No. 36 at 8:12-16. R.W. cites to a March 7, 2017 email string as evidence.
18 *See* ECF No. 36 at 8:12-16 (citing to ECF No. 37-23). However, the March 7,
19 2017 email string says nothing of the sort. *See* ECF No. 37-23 at 1. Reagan sent
20 notice of the interim trespass decision at 11:40 a.m. on March 7, 2017. ECF No.
21 37-23 at 1. At 1:57 p.m. on March 17, 2017, in response to Reagan's earlier email,
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1 the Resource Center notified Reagan that R.W. was a student who received their
2 services. ECF No. 37-23 at 1. Another example of a misrepresentation is R.W.'s
3 implied suggestion that CBC provided R.W. with an accommodation for his
4 depression. *See* ECF No. 36 at 5:19-24. R.W. implies this by listing depression
5 as one of his disabilities immediately before he writes that CBC knew he was
6 disabled and provided him with accommodations. *See* ECF No. 36 at 5:19-24.
7 However, R.W. did not disclose his depression to CBC before the interim trespass
8 occurred. ECF No. 35-4 at 30 (R.W. Dep. at 63:13-20). The Resource Center
9 could not have approved accommodations for a condition they did not know
10 about.

11 Finally, R.W. incorrectly asserts that Reagan specifically attributed R.W.'s
12 homicidal ideation to R.W.'s disabilities.² ECF No. 36 at 12:17-13:10. Reagan
13 testified that he wasn't attempting to diagnose the source of R.W.'s homicidal
14 ideation. ECF No. 37-8 at 15-16 (Reagan Dep. at 174:21-175:14). Reagan also
15 testified that he thought the cause was potentially multi-faceted. ECF No. 37-8 at
16

17 ² The cause of R.W.'s homicidal ideations are ultimately irrelevant because the
18 College took action based upon concerns presented by R.W.'s homicidal ideation,
19 not any disability, and the College can certainly take action to protect against
20 R.W.'s homicidal ideation, even if it is caused by a disability. *Macy v. Hopkins*
21 *Cnty. Sch. Bd. of Educ.*, 484 F.3d 357, 366–71 (6th Cir.2007), abrogated on other
22 grounds, *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312 (6th Cir.2012).

1 15-16 (Reagan Dep. at 174:21-175:14) (“I mean, I guess yes. But I – not like I’m
2 diagnosing him. I just – based on what I read through, what he’s going through,
3 and everything and what led to it, stress and lack of sleep and things – you know,
4 those kind of things, obviously.”) R.W. himself identified the trigger of his
5 homicidal thoughts to bad grades and feedback from faculty when he was initially
6 evaluated by crisis response. ECF No. 35-1 at 19, 53 (Perez Dep. at 27:2-12, Ex.
7 2).

8 For these reasons, along with the other corrections and clarifications
9 offered in Defendant’s Statement of Disputed Material Facts, the Court should
10 reject R.W.’s version of the events as unsupported by the record and deny his
11 motion for summary judgment.

12 **B. R.W. Is Not Entitled To Judgment As A Matter Of Law On His**
13 **Various Claims Against The Defendants.**

14 **1. R.W.’s 42 U.S.C. § 1983 First Amendment Claim Fails As A**
15 **Matter Of Law.**

16 R.W. argues that CBC violated his First Amendment rights by trespassing
17 him from campus and imposing sanctions as a result of his homicidal ideation. ECF
18 No. 36 at 15:20-21:5. R.W. also attempts a preemptive strike against qualified
19 immunity by arguing that First Amendment case law was so clearly established, the
20 Defendants should have known they were violating R.W.’s First Amendment
21 rights. ECF No. 21:6-25:24. R.W. is grossly mistaken on both accounts.

22 R.W.’s analysis fails to cite, much less distinguish, the two most recent,

germane Ninth Circuit Court of Appeals cases regarding threats of school violence. *See McNeil v. Sherwood School Dist.* 88J, 918 F.3d 700 (9th Cir. 2019); *Wynar v. Douglas County School Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013). *See* ECF No. 36 at 2 (table of authorities). Instead, R.W. builds his arguments around cases and legal principles that fail to squarely address the question presented. For instance, *College Republicans at San Francisco State University v. Reed*, 523 F.Supp.2d 1005, 1007 (N.D. Cal. 2007), which R.W. relies heavily upon, did not involve threats of school violence. As R.W. describes it, that case only involved “an anti-terrorism rally where demonstrators stomped on paper-versions of flags” and alleged violations of the student code requiring students to be civil. ECF No. 36 at 18. This appears to be a strategic decision because the relevant, binding Ninth Circuit precedent disproves of his First Amendment arguments. *McNeil v. Sherwood School Dist.* 88J, 918 F.3d 700 (9th Cir. 2019) provides a keen illustration.

In *McNeil*, the Ninth Circuit addressed whether a school district could discipline a student based upon a 4 month old entry in the student’s private journal that came to the school’s attention only because the student’s mother stumbled across the entry and then shared it with a mental health professional. *McNeil*, 918 F.3d at 703-04. Ultimately, the Ninth Circuit, in a unanimous decision, affirmed the District Court’s summary dismissal of the student’s First Amendment claim against the school district. *Id.* at 703-04. The *McNeil* Court

1 described the test for determining whether discipline violates the First
2 Amendment as follows:

3 ... courts considering whether a school district may constitutionally
4 regulate off-campus speech must determine, based on the totality of
5 the circumstances, whether the speech bears a sufficient nexus to the
6 school. This test is flexible and fact-specific, but the relevant
7 considerations will include (1) the degree and likelihood of harm to
8 the school caused or augured by the speech, (2) whether it was
9 reasonably foreseeable that the speech would reach and impact the
10 school, and (3) the relation between the content and context of the
11 speech and the school. There is always a sufficient nexus between
12 the speech and the school when the school district reasonably
13 concludes that it faces a credible, identifiable threat of school
14 violence.

15 *McNeil*, 918 F.3d at 707-08 (internal citations omitted) (emphasis added). The
16 *McNeil* Court specifically rejected the idea that a student's intent to keep
17 expressions of violence private can insulate the student from discipline:

18 CLM attempts to distinguish *Wynar* on the ground that he had no
19 intent to communicate the contents of his speech to anyone. That
20 distinction cannot be dispositive. We have recognized repeatedly
21 that the specter of school violence places a weighty social
22 responsibility on school districts to ensure that "warning signs" do
not turn to tragedy. This responsibility does not mean schools may
"expel students just because they are 'loners,' wear black and play
video games." It does mean, however, that a student's intent,
although relevant, does not necessarily define the threat of violence.
We reaffirm our holding in *Wynar* that regardless of the speaker's
intent or how speech comes to a school district's attention, a school
district may take disciplinary action in response to off-campus
speech when it reasonably determines that it faces an identifiable
and credible threat of school violence.

Id. at 708 (internal citation omitted) (emphasis added).

McNeil is dispositive of R.W.'s First Amendment claim because *McNeil*

1 expressly holds, “[t]here is always a sufficient nexus between the speech and the
2 school when the school district reasonably concludes that it faces a credible,
3 identifiable threat of school violence,” *id.* at 707-08, and here the College
4 reasonably concluded that R.W. presented a credible, identifiable threat of school
5 violence. The College’s conclusion was reasonable based upon the following
6 undisputed facts. R.W. disclosed homicidal ideation. ECF No. 35-6 at 22
7 (Cabasug Dep. at Ex. 3 (March 6, 2017 Progress Note)). In doing so, he identified
8 specific faculty members as targets. ECF No. 35-1 at 28 (Perez Dep. at 37:11-
9 19). He identified specific ways in which he envisioned killing the faculty
10 members. ECF No. 35-1 at 38 (Perez Dep. at 51:3-12). His ideation was
11 significant enough that crisis response required R.W. to either check himself into
12 a residential treatment program or be civilly committed. ECF No. 35-1 at 36
13 (Perez Dep. at 49:10-50:10) and ECF No. 35-2 at 49-50 (R.W. Dep. at 83:23-
14 84:18). R.W.’s ideation was serious enough that crisis response initiated their duty
15 to warn protocols. ECF No. 35-1 at 38 (Perez Dep. at 51:13). The College was
16 aware that R.W. himself identified that bad grades and feedback from his
17 instructors triggered his thought to harm them. ECF No. 35-1 at 19, 53 (Perez
18 Dep. at 27:2-12, Ex. 2). Further, when the College investigated R.W.’s
19 disclosure, involved health care providers stopped short of assuring the College
20 that R.W. would not have any recurrence of his homicidal ideation upon returning
21 to the school environment. ECF No. 35-4 at 110-12 (Reagan Dep. at 136:16-
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1 138:8); ECF No. 35-6 at 5-6 (Cabasug Dep. at 15:9-16:11). Thus, there is no
2 genuine issue of material fact that CBC reasonably concluded that it faced a
3 credible, identifiable threat of school violence.³

4 *McNeil* also disposes of R.W.’s central argument – that he cannot be
5 sanctioned when his only conduct was disclosing his homicidal ideation to his
6 primary care physician.⁴ ECF No. 36 at 20:11-21:5. As the *McNeil* Court said, “.
7 . . regardless of the speaker’s intent or how speech comes to a school district’s
8 attention, a school district may take disciplinary action in response to off-campus
9 _____

10 ³ A more complete description of the application of *McNeil* to this matter
11 is found at ECF No. 31 at 14:1-18:10 and incorporated herein by reference. Of
12 particular consequence is that R.W.’s First Amendment rights were properly
13 curtailed because they conflicted with another person’s rights in the workplace
14 and were reasonably expected to cause a substantial disruption. *See* ECF No. 31
15 at 17:3-18:10.

16 ⁴ R.W. seems to suggest that his disclosure of homicidal ideation is
17 somehow protected speech because he made it to his primary care provider. *See*
18 ECF No. 36 at 17:3-15. R.W.’s suggestion is erroneous. In *Petersen v. State*, 100
19 Wn.2d 421, 427-28, 671 P.2d 230 (1983) the Washington State Supreme Court
20 recognized a specific duty to warn on the part of health care providers. Moreover,
21 the Washington State Legislature has expressly excluded the duty to warn from
22 the statutory immunities expressed in 71.05.120. *See* RCW 71.05.120(3).

1 speech when it reasonably determines that it faces an identifiable and credible
2 threat of school violence.” *Id.* at 708.

3 The closest R.W. gets to citing directly applicable precedent is *LaVine v.*
4 *Blaine School District*, 257 F.3d 981, 983-84 (9th Cir. 2001). R.W. cites to *LaVine*
5 for the proposition that First Amendment jurisprudence is so clearly established,
6 the Defendants should have known their actions violated R.W.’s First
7 Amendment rights. ECF No. 36 at 22:6-25:24. R.W.’s argument that the law was
8 clearly established at the time under the *LaVine* opinion does not logically follow
9 because the *LaVine* Court found that the emergency expulsion of the student did
10 not violate his First Amendment rights due to school’s perceived threats in his
11 poem and its concerns for student safety. *LaVine*, 257 F.3d at 992. The *LaVine*
12 court’s finding of a First Amendment violation was limited to “the school’s
13 placement and maintenance in [LaVine’s] file of ‘negative documentation’” after
14 the school had allowed Lavine had “to return to classes and had satisfied itself
15 that [he] was not a threat to himself or others.” *Id.* This is readily distinguishable
16 from the First Amendment violation that R.W. posits in his motion for summary
17 judgment.

18 Even if we assume for the sake of argument that R.W.’s interpretation of
19 the 2001 *LaVine* decision is correct, *LaVine* still does not preclude granting the
20 Defendants qualified immunity. The Ninth Circuit’s 2013 and 2019 decisions in
21 *Wynar v. Douglas County School Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013) and
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1 *McNeil v. Sherwood School Dist.* 88J, 918 F.3d 700 (9th Cir. 2019) are still
2 binding precedent. Both *Wynar* and *McNeil* support the proposition that the
3 discipline imposed here did not offend the First Amendment, as discussed above.
4 At best, R.W.'s interpretation of *LaVine* means that a conflict exists in Ninth
5 Circuit case law. A conflict prevents a finding that the law was so clearly
6 established that the Defendants knew their actions would violate R.W.'s First
7 Amendment rights.

8 For these reasons, R.W.'s motion for summary judgment on his 42 U.S.C.
9 § 1983 First Amendment claim must be denied.

10 **2. R.W.'s ADA, Rehabilitation Act, And WLAD Claims Fail As A**
11 **Matter Of Law.**

12 R.W. seeks summary judgment on his Americans with Disabilities Act
13 (ADA), Rehabilitation Act, and Washington Law Against Discrimination (WLAD)
14 claims, arguing that the undisputed material facts support each element of each
15 claim. ECF No. 36 at 26:1-30:23. R.W.'s position is wrong for a number of reasons.

16 First, R.W.'s position is wrong because R.W.'s analysis is incomplete. As
17 explained in Defendants' Motion and Memorandum for Summary Judgment,
18 R.W.'s disclosure that he thought of killing three of his instructors by setting fire
19 to their offices or attacking them with a saw precludes him from being a qualified
20 individual under any of the Acts because of the direct threat he posed. *See* ECF No.
21 31 at 21:10-23:2. Moreover, the College did not improperly exclude R.W. on the
22 basis of a disability by responding to R.W.'s homicidal ideation, even if his

1 homicidal ideations arose from a disability. *See* ECF No. 31 at 23:3-24:2, 25:1-
2 26:18; *see also* *Macy v. Hopkins Cnty. Sch. Bd. of Educ.*, 484 F.3d 357, 366–71
3 (6th Cir.2007), abrogated on other grounds, *Lewis v. Humboldt Acquisition Corp.*,
4 *Inc.*, 681 F.3d 312 (6th Cir.2012) (“this court has repeatedly stated that an employer
5 may legitimately fire an employee for conduct, even conduct that occurs as a result
6 of a disability, if that conduct disqualifies the employee from his or her job.”).

7 Second, R.W.’s position is wrong because his reliance on *R.W. v. Bd. of*
8 *Regents of the Univ. Sys. of Georgia* is misplaced. In his motion, R.W. relies heavily
9 upon *R.W. v. Bd. of Regents of the Univ. Sys. of Georgia*, 114 F. Supp. 3d 1260,
10 1267 (N.D. Ga. 2015) to argue that he received disparate treatment due to his
11 disability under the ADA, Rehabilitation Act, and WLAD. While that case also
12 involves claims arising under the ADA and Rehabilitation Act against a college, it
13 has little bearing on this case. The direct threat posed by Wilkes in *Bd. of Regents*
14 is vastly different than the undisputed nature of the threat posed by R.W. here. In
15 *Bd. of Regents*, the student had a history of schizophrenia and presented to the
16 college’s healthcare providers with signs of unusual behavior that indicated he was
17 suffering from hallucinations, but Wilkes did not express any threats against any
18 other students or faculty. In fact, the college administrator responsible for
19 adjudicating his case could only describe Wilkes’ risk of harm by stating “[a]ll I
20 can say generally is a risk of disruption.” *Id.* at 1289. While the school placed
21 various conditions upon Wilkes, including removing eligibility for campus
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1 housing, Wilkes did not comply with any of the imposed conditions and remained
2 enrolled in classes and remained in campus housing throughout the semester. *Id.* at
3 1270. Moreover, “the parties agree[d] that Plaintiff has never been disciplined for
4 any sort of threatening or disruptive behavior, has never written or said anything
5 suggesting violence or a desire to harm someone, has never been involved in any
6 altercations, and has never been arrested or charged with a crime.” *Id.* 1285.

7 Here, R.W. expressed an actual, direct threat against three specific faculty
8 members – a fact not present in *Bd. of Regents*. Further, R.W. reported specific
9 ways in which he envisioned killing his professors – a fact not present in *Bd. Of*
10 *Regents*. Even further, R.W. self-identified that the stress of the academic quarter
11 triggered his homicidal ideation – a fact not present in *Bd. of Regents*. R.W.’s
12 homicidal ideation actually disrupted the nursing program by causing one faculty
13 member to have a complete meltdown after she learned she was a target of R.W.’s
14 homicidal ideation – a fact not present in *Bd. of Regents*. These key differences
15 leave *Bd. of Regents* unhelpful to R.W.

16 Outside of *R.W. v. Bd. of Regents of the Univ. Sys. of Georgia*, 114 F.Supp.3d
17 1260, discussed above, the only other case that R.W. cites in his discussion of the
18 “direct threat” analysis is *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998) for the
19 narrow proposition that a risk assessment must be based on medical or other
20 objective evidence. ECF No. 36 at 29. Here there is no question that Reagan
21 “thoroughly” reviewed R.W.’s medical records and interviewed his medical
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1 providers. ECF No. 38 at 9:5-12; ECF No. 31 at 7:10-8:16. Significantly, none of
2 R.W.'s medical providers went so far as to tell Reagan that R.W. would not pose a
3 threat once he resumed classes and again encountered the stressful environment that
4 he attributes to causing his homicidal ideation. ECF No. 31 at 7:17-8:16. Thus, the
5 objective medical evidence considered by Reagan supported his assessment that
6 action was warranted.

7 Third, R.W.'s position is wrong because he fails to account for cases like
8 *Mayo v. PCC Structural, Inc.*, 2013 WL 3333055 (D. Or. 2013) that exclude actual
9 threats of violence from the ADA's protections. In *Mayo*, the plaintiff (Mayo)
10 communicated threats to several co-workers that he was going to bring a gun to
11 work and shoot three of his supervisors. His co-workers communicated the threats
12 to their supervisor, and Mayo was hospitalized for six days under a Police Officer
13 Mental Hold after admitting to the threats and suicidal thoughts. *Mayo*, 2013 WL
14 3333055 at *1. Mayo had been treated for Major Depressive Disorder at the time,
15 but he had not communicated this to his employer. *Id.* Eventually, Mayo was
16 terminated. *Id.* at *2. Mayo brought a claim for disability discrimination under
17 Oregon's disability discrimination statute, which is meant to be construed to the
18 greatest extent possible in a manner consistent with the ADA, and the court "rel[ie]d
19 greatly on the ADA case law" due to the lack of cases analyzing Oregon's statute.
20 *Id.* at *3. The *Mayo* court noted that there was not any Ninth Circuit case law
21 "discussing situations in which an employee threatened violence against another
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1 employee.” *Id.* The court noted two lines of cases, wherein “[s]ome courts have
2 simply said an employer can terminate an employee for making violent threats,
3 even if the threats are caused by a disability, because the termination is for
4 misconduct and not a pretext for discrimination,” while other courts “rely on the
5 text of the ADA to hold that unacceptable behavior threatening the safety of others
6 makes the employee unqualified under the ADA, even if the behavior stems from
7 a mental disability.” *Id.* (internal citations omitted). Ultimately, the court held that
8 it was “persuaded by the analysis that ADA protection is provided to qualified
9 individuals with a disability, and violent threats disqualify an employee” and found
10 that Mayo was not entitled to protection under the ADA. *Id.* at *4.

11 Ultimately, the Defendants in this case did not act because of R.W.’s claimed
12 disabilities. Rather, the Defendants acted because R.W.’s expressions of homicidal
13 ideation represented a threat to the College and actually created a hostile and
14 intimidating environment for the involved faculty members. Therefore, his
15 disability discrimination claims fail as a matter of law.

16 **III. CONCLUSION**

17 For the reasons discussed above, the Court should deny R.W.’s motion for

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1 summary judgement in its entirety.

2 DATED this 24th day of June, 2019.

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DATED this 24th day of June, 2019, at Spokane, Washington.

s/Carl P. Warring

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